No. 28879-0-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

ANDREA BARTLETT STROM,

Appellant/Plaintiff

v.

RED LION HOTELS CORPORATION

Defendant

BRIEF OF RESPONDENT RED LION HOTELS CORPORATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

A. Assignment of Error

Assignment of Error

Respondent assigns no error to the trial court's Order Granting Defendant's Motion for Summary Judgment.

Issues Pertaining to Appellant's Assignment of Error

1. Is respondent (hereinafter "the Red Lion Hotel") entitled to summary judgment where the appellant (hereinafter "Ms. Strom"), an invitee of the Red Lion Hotel, fell due to a deviation in a carpeted surface that was so minor that it was not an unreasonably dangerous condition on the property? *Yes.*

2. Is the Red Lion Hotel entitled to summary judgment where Ms. Strom does not present the requisite evidence that the hotel had actual or constructive knowledge of the deviation in the carpeted surface? *Yes.*

3. Is the Red Lion Hotel entitled to summary judgment where Ms. Strom does not present the requisite evidence that her fall was proximately caused by the hotel's negligence? *Yes.*

B. Counter-Statement of the Case

Ms. Strom brought this action for personal injuries allegedly sustained when she tripped and fell on September 15, 2006 over an extremely small deviation in the surface of the carpeting in the lobby of the Red Lion Hotel at the Park, which is owned by the Red Lion Hotel.

Ms. Strom's answers to interrogatories state, "I was walking out of restaurant, talking to the Red Lion hostess when the heel of my shoe caught a rise in the concrete covered by the carpet located in the lobby of the Red Lion restaurant called the Atrium Cafe." (CP 40 & 42). Ms. Strom was wearing high heel shoes. (CP 35).

The carpet was not "loose" and did not have a "wrinkle". The Brief of Appellant mischaracterizes the carpet as "loose" at page 2 and as having a "wrinkle" at pages 3 and 5. These characterizations are neither accurate nor supported by any evidence. Ms. Strom's declaration does not describe the carpet as being "loose" or having a "wrinkle". (CP 53-54). In fact, Ms. Strom initially submitted a declaration in opposition to the motion for summary judgment that described the deviation using the terms "loose", "folded" and "blistered". (CP 64, fn. 1). Following an objection by the Red Lion Hotel's counsel, Ms. Strom's counsel voluntarily withdrew that original declaration and submitted the revised declaration of record that deleted the terms "loose", "folded" and "blistered" from Ms. Strom's description of the carpet. (CP 64, fn. 1).

As part of the Red Lion Hotel's standard accident investigation procedures, Dan Gann, the Red Lion Hotel's Director of Security and Loss Prevention, inspected the accident scene and met with Ms. Strom at the hotel within days of her fall. (CP 19). Photographs of the accident scene

taken by Mr. Gann show that the minimal deviation in height was imperceptible to the naked eye. (CP 19 & 23-29). The deviation is less than the width of the pen shown in the photographs. (CP 19 & 25-29). It is no greater than the deviation a few feet away where the carpeting ends and tile floor begins. (CP 19-20). It is no greater than if a throw rug had been laid on top of the carpet. (CP 20).

In 2001, the Red Lion Hotel had the lobby remodeled. (CP 20). The remodeling included the addition of a planter near the location of Ms. Strom's alleged fall. As part of the planter addition, a new concrete subfloor was placed around the planter. The concrete subfloor was covered with a carpet pad and carpet. (CP 20).

After Ms. Strom's fall, the carpeting and carpet pad were removed and it was discovered that a portion of the concrete installed around the planter had cracked at some unknown time before her fall. (CP 20–21). At its maximum height, the deviation in elevation caused by the crack was no more than ½" high. (CP 20).

The Red Lion Hotel regularly inspects its premises for hazardous conditions. (CP 20). This certainly includes the location of Ms. Strom's fall, which is in the lobby of the hotel near the entrance to the Atrium Café. (CP 20). The area is open, obvious and easily observable to the hotel's employees and guests on a constant basis. (CP 20). It is a location

typically travelled by hundreds of guests and employees. (CP 20). If a hazardous condition existed, it would have been obvious to hundreds of people. (CP 20).

At no time before Ms. Strom's fall did the Red Lion Hotel know of the existence of the concrete crack hidden by the carpet pad and carpeting. (CP 20). Nor did the hotel know of the minor deviation in the carpeted surface over the crack. (CP 20). At no time before Ms. Strom's fall, did any customer, employee or other person complain of the condition or any hazard created by the condition. (CP 20). The hotel does not know of any other person to have fallen or stumbled at the location during the five years between the remodel and Ms. Strom's fall. (CP 20).

The length of time that the crack under the carpet existed is unknown. (CP 21). It could have existed for months or years and was undetected because it caused such an insignificant deviation in the carpeted surface. The concrete could also have cracked earlier on the day of plaintiff's fall.

C. Argument

1. The Hotel's Duty to Ms. Strom was one of Reasonable and Ordinary Care.

A property owner's duty to an invitee is a duty only to exercise "reasonable care". The pattern jury instruction on a property owner's duty

to invitees states this duty of reasonable and ordinary care:

> An owner or occupier owes to a [business] [or] [public] invitee a duty to exercise *ordinary care* [for his or her safety.] [This includes the exercise of *ordinary care*] [to maintain in a *reasonably safe condition* those portions of the premises which the invitee is expressly or impliedly invited to use or might reasonably be expected to use].

WPI 120.06 (emphasis added.) Accord, Ford v. Red Lion Inns, 67 Wn. App. 766, 770, 840 P.2d 198 (1992) ("A possessor of land owes a duty of reasonable care to invitees with respect to dangerous conditions on the land.")

2. A Plaintiff Must Establish Three Essential Elements.

A plaintiff must establish three essential elements to prove a property owner's liability, which the courts describe with only slight variation. In a Washington Supreme Court opinion, the Court affirmed a directed verdict for the defendant at the close of the plaintiff's case. The plaintiff was struck by a foul ball while watching a baseball game in the defendant's baseball park and sued for negligence. Leek v. Tacoma Baseball Club, Inc., 38 Wn.2d 362, 229 P.2d 329 (1951). The Court described the three essential elements of a plaintiff's prima facie case:

> Generally speaking, the possessor of land is liable for injuries to a business visitor caused by a condition encountered on the premises **only if he** (a) **knows or should**

> **have known of such condition** and that it involved an **unreasonable risk**; (b) has no reason to believe that the visitor will discover the condition or realize the risk; and (c) fails to make the condition reasonably safe or to warn the visitor so that the latter may avoid the harm.

Leek .v Tacoma Baseball Club, Inc., 38 Wn.2d 362, 365-66, 229 P.2d 329 (1951) (citations omitted. Emphasis added).

The same elements exist in Restatement (Second) of Torts § 343 (1965), and have been adopted by the courts:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land, if but **only if**, he (a) **knows or by the exercise of reasonable care would discover the condition**, and should realize that it involves an **unreasonable risk of harm** to such invitees; and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect them against the danger.

Ford v. Red Lion Inns, *supra*, 67 Wn. App. at 770 (Emphasis added). Accord Iwai v. Washington, 129 Wn.2d 84, 93-94, 915 P.2d 1089 (1996); WPI 120.07.

3. Ms. Strom does not Create a Genuine Issue that the Red Lion Hotel's Property Contained an Unreasonable Risk of Harm.

Ms. Strom must create a genuine issue of fact that the negligible deviation in the carpeted surface created an "unreasonable risk of harm". Ms. Strom does not meet this burden. The crack in the concrete subfloor

created a deviation in the concrete of no more than ½" at its maximum height. (CP 20). That crack was covered and cushioned by carpeting and a carpet pad designed to create a cushion for walking. (CP 20). Therefore, the deviation was neither sharp nor abrupt. Hundreds of guests and employees walked where Ms. Strom fell and, yet, the condition was not so hazardous as to cause any other falls, stumbles or even complaints. (CP 20). Ms. Strom simply does not establish that the minor deviation created the requisite "unreasonably dangerous condition".

Both parties have cited to the Washington Court of Appeals decision in Hoffstatter v. City of Seattle, 105 Wn. App. 596, 20 P.3d 1003 (2001). The importance of the Hoffstatter opinion is this: a court can grant summary judgment to a property owner by finding that a condition on the defendant's property over which the plaintiff tripped does not constitute an unreasonably dangerous condition as a matter of law. The court considered whether a tripping hazard presented by uneven bricks in a landscaped parking strip between the sidewalk and city street presented an unreasonably dangerous condition for pedestrians. On appeal from an order granting summary judgment to the city and property owner, the appellate court held that the uneven bricks did not constitute the requisite unreasonably dangerous condition and affirmed, "We hold that as a matter of law the uneven surface of the bricks was not unreasonably dangerous." Hoffstatter, 105 Wn.App. at 601.

The extremely minor discrepancy in elevation in the carpeting of the Red Lion Hotel lobby does not constitute an unreasonably dangerous condition and the hotel is entitled to summary judgment.

4. The Parties Disagree as to whether it is the Law of this State and in the Furtherance of Public Policy to Hold Property Owners Liable for "Any Flaw" in a Walking Surface.

Ms. Strom contends that any inconsistency in the carpeting of a hotel lobby, no matter how insignificant, creates an unreasonably dangerous condition sufficient to avoid summary judgment and compel a trial regarding the hotel's alleged liability. The Brief of Appellant states:

> ...A jury could infer that any flaw in a carpeted, apparently smooth floor poses a tripping hazard when people are walking over the area...[1]

Brief of Appellant, p. 9-10 (Underline added, although present in Plaintiff's Memorandum Opposing Summary Judgment).

The Red Lion Hotel proposes that it is neither the law of this State nor in the furtherance of public policy to hold property owners liable for "any flaw" in a walking surface. It is not the law or the desire of the legislature and the courts to increase the costs to business owners by

[1] Plaintiff's Memorandum Opposing Summary Judgment preceded this same sentence with "The mere size of the defect does not establish it is not dangerous as a matter of law." (CP 59).

compelling them to trial or to clog the courts with lawsuits involving any flaw in a walking surface, no matter how minor. Contrary to Ms. Strom's argument, size does matter. At some point, no reasonable jury would find the minor flaw to constitute an unreasonably dangerous condition. The Court can and should conclude that the negligible deviation was not an unreasonably dangerous condition as a matter of law.

5. The Occurrence of an Accident is neither Proof of an Unreasonably Dangerous Condition nor of Negligence.

Ms. Strom cannot claim that the fact she fell is evidence, in itself, of an unreasonably dangerous condition or of negligence by the Red Lion Hotel. Case law specifically holds that this argument is erroneous. In Las v. Yellow Front Stores, Inc., 66 Wn. App. 196, 831 P.2d 744 (1992), the plaintiff sued a store at which she was shopping when five or six skillets fell from a shelf injuring her foot. The court rejected the plaintiff's argument that the fact that the skillets fell from the shelf was evidence in itself of an unreasonably dangerous condition. The appellate court affirmed summary judgment for the defendant. The court stated "Las continually asserts the pans could not have fallen without negligence on someone's part, but she fails to demonstrate that the pans could not have fallen without the negligence of Yellow Front Stores. It is quite easy to contemplate an accident such as this without the negligence of any party. The fact there was an accident and an injury does not necessarily mean

there was negligence." *Id.* at 201-02.

Negligence cannot be inferred from the mere fact of an accident and injury. Las v. Yellow Front Stores, Inc., *supra*, 66 Wn. App. at 200; Brandt v. Market Basket Stores, Inc., 72 Wn. App.2d 447, 449-50, 433 P.2d 863 (1967); Merrick v. Sears Roebuck & Co,, 67 Wn.2d 462, 429, 407 P.2d 960 (1965). Landowners are not the insurers of the safety of invitees on their property. Memel v. Reimer, 85 Wn.2d 685, 689, 538 P.2d 517 (1975); Maynard v. Sisters of Providence, 72 Wn. App. 879, 844, 866 P.2d 1272 (1994).

6. Ms. Strom Does not Create a Genuine Issue that the Red Lion Hotel Knew or had Reason to Know that its Property Contained an Unreasonable Risk of Harm.

Negligence is predicated upon the property owner's actual or imputed knowledge of the danger, without which there can be no liability:

> Basic in the law of negligence is the tenet that the duty to use care is predicated upon knowledge of danger, and the care which must be used in any particular situation is in proportion to the actor's knowledge, actual or imputed, of the danger to another in the act to be performed.
>
> This principle is an integral part of the law relating to the liability of the owners or occupants of premises.

Leek .v Tacoma Baseball Club, Inc., *supra*, 38 Wn.2d at 365-66 (citations omitted).

A plaintiff must establish that the defendant "knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees." Ford v. Red Lion Inns, *supra*, 67 Wn. App. at 770. The Supreme Court explained:

> **Washington Law requires plaintiffs to show the landowner had actual or constructive notice of the unsafe condition**. ...The notice requirement insures liability attaches only to owners once they have become or should have become aware of a dangerous situation.

Iwai v. State, 129 Wn.2d 84, 96-97, 915 P.2d 1089 (1996) (Citations omitted. Emphasis added). Accord, Ingersoll v. Debartolo, Inc., 123 Wn.2d 649, 652, 869 P.2d 1014 (1984).

Ms. Strom purports to state an exception to the required notice, "However, when an unsafe condition is created by a landowner, the requirement for notice is inapplicable. (Brief of Appellant, p. 8; emphasis added). The implication is that the Red Lion Hotel created the minor deviation in the carpet. Such an argument would be a red herring. First, the Red Lion Hotel did not create the crack under the carpet. There is no evidence regarding how, why or when the crack occurred, but it was not created by the hotel. It probably developed as a result of the settlement of

the ground or foundation. Second, creation of the hazard is not so much an exception to the requirement of notice as a way of establishing constructive notice. One is presumed to have constructive notice of a danger he creates, "the rule requiring such notice is not applicable where the dangerous condition of the premises was created in the first instance by the occupant.... One is presumed to know what one does." Iwai v. State, 129 Wn.2d 84, 102, 915 P.2d 1089 (1996).

Ms Strom fails to present any evidence that the Red Lion Hotel knew or should have known of the alleged danger. It is undisputed that no one had ever complained about the condition or had been injured by it. (CP 20). The Red Lion Hotel had no knowledge of the minor deviation in the carpeting. (CP 20). This is either because the condition was so minor that it was not noticed, or that it only developed shortly before plaintiff's fall.

In Frederickson v. Bertolino's Tacoma, Inc., the plaintiff was injured at the defendant's coffee shop when he sat in an old chair that broke. The defendant primarily purchased old wooden chairs at garage sales and antique stores to support the coffee shop's décor and ambience. The owner regularly inspected the old chairs to see if they were too "rickety", "wobbly or needed to be fixed". Fredrickson v. Bertolino's Tacoma, Inc., 131 Wn.App. 183, 186-87, 127 P.3d 5 (2006). As in the present case, plaintiff did not submit evidence that other chairs had

broken, or that customers had complained or been injured. Id., at 193. Therefore, the appellate court affirmed summary judgment in favor of the defendant because there was no evidence that defendant had actual or constructive knowledge of the hazardous condition of the chair. Id., at 191. In the case presently before the Court, the evidence is equally undisputed that the carpet's minor deviation was not discovered during the Red Lion Hotel's regular inspections and no customers had ever complained of the condition or been injured. The Red Lion Hotel is entitled to summary judgment.

7. The Court should Disregard the Speculation in Plaintiff's Declaration regarding what she Assumes Hotel Employees should have Felt when Vacuuming the Carpet.

Ms. Strom does not submit the declaration or deposition testimony of anyone alleging that they knew of the deviation before plaintiff's fall. She presents no evidence from a present or former hotel employee, hotel guest, building inspector or anyone to establish that the Red Lion Hotel knew or should have known of the imperceptible deviation before Ms. Strom's fall. Instead, she speculates that the hotel's employees should have felt the minor deviation when vacuuming the carpet. This is rank and impermissible speculation. Ms. Strom does not know what the hotel's

employees felt when vacuuming. She does not present any testimony by defendant's employees. She does not present the opinion of any expert witness. She has never vacuumed the hotel's carpet. She does not allege that she has any experience operating the type of vacuum cleaning operated by hotel employees. (See CP 53-54).

The speculation contained in Ms. Strom's declaration as to what she assumes others would feel when vacuuming the carpet should be disregarded by the Court.[2] It is inadmissible speculation, lacks foundation and lacks personal knowledge. This is equally true of Ms. Strom's speculation that marks were created by vacuuming and her speculation as to the length of time that the condition had existed.

8. Ms. Strom Does not Create a Genuine Issue that the Red Lion Hotel was Negligent.

Last, but not least, Ms. Strom must also create a genuine issue that the hotel failed "to exercise reasonable care to protect them against the danger". As explained in section 4 above, the fact of an accident is not evidence that the accident was caused by the property owner's negligence. Negligence cannot be inferred from the mere fact of an accident and injury. Las v. Yellow Front Stores, Inc., *supra*, 66 Wn. App. at 200.

[2] The Red Lion Hotel preserved this objection with a motion to strike in the trial court. (CP 65). As is common in hearings on motions for summary judgment, the trial judge granted defendant's motion for summary judgment without expressly ruling on the motion to strike.

Considering the undisputed evidence that the Red Lion Hotel regularly inspected the carpet, no one had ever complained about the condition, no one had been previously injured by the condition, and no one had even noticed the minor condition, Ms. Strom fails to create a genuine issue of fact that the hotel failed to exercise reasonable care.

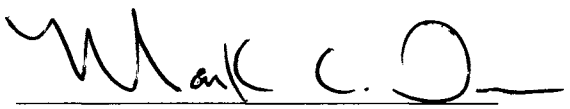
D. Conclusion.

The Red Lion Hotel is not liable for Ms. Strom's accident. Ms. Strom fails to raise a genuine issue of fact that:

1. the accident was caused by an unreasonably dangerous condition,
2. the Red Lion Hotel had notice of the condition, and
3. the Red Lion Hotel was negligent.

DATED: August 24, 2010.

THE LAW OFFICES OF MARK DEAN



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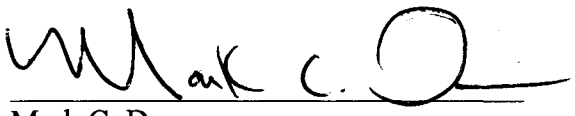
CERTIFICATE OF SERVICE

MARK C. DEAN certifies upon penalty of perjury:

I have on this date served the foregoing document upon the following party by the following means:

TO:	BY:
Attorney for Plaintiff: Dustin Deissner Van Camp & Deissner 1707 W. Broadway Avenue Spokane, WA 99201	[x] By UPS [ ] By Facsimile ((509) 326-6978)

DATED: August 25, 2010



Mark C. Dean